THE ARRANGEMENT OF THE LAW.

I.

In substance our law is excellent, full of good sense and justice. But in respect to its form it is chaotic. What it needs at present more than anything else is a complete and systematic arrangement.

The chief object of such an arrangement is of course the practical one of making the law easier to find and to understand, and it would be mere barren pedantry to sacrifice that to any consideration of "scientific" or "logical" perfection. All the same it is true that no arrangement can be the most practically useful or can be permanent unless it possesses in a high degree that character which is usually denoted by the words "scientific" or "logical". The only possible clues to the tangled maze of details are principles. Each legal principle must be set forth in its most general form, and the various principles so grouped in the scheme of arrangement as to show their relation to and connection with each other; and then under each general principle should be exhibited its subordinate principles and special applications and the qualifications and exceptions to which it may be subject.

Although an arrangement of the law must, as has been said, be in the main logical, it cannot avoid being to some extent arbitrary. The fields of application of different legal principles to some extent overlap. A particular case often might equally well fall under either of two different principles. This happens whenever we attempt to apply definitions or verbal statements to large and complex masses of facts. It happens in the natural sciences. Nature does not present the clear and sharp lines of cleavage which we have to use in our thought and language. One set of facts shades off into another with innumerable intermediate and doubtful conditions. In the natural sciences this causes little trouble, because verbal definitions and formulae are not very important there. But it is otherwise in the positive science of law, where we have to express our rules and principles in words and abide by our verbal definitions. This is a difficulty in the law which can never be got rid of, so that in an arrangement of the law or in a code there will always be a certain number of subordinate rules and details whose position cannot be determined by any logical deduction, but must be by convenience, and therefore

arbitrarily in the sense that a particular rule might often be put in one place as well as another.

An arrangement of the law must be based on an exhaustive analysis of legal conceptions. Each conception must be analyzed into its ultimate elements: that is, the analysis must be carried to the point where any further analysis would not belong to the science of law, where for legal purposes the meaning of the elementary conceptions must be taken as known.

The results of the analysis must be expressed in a complete, orderly and logical terminology. The existing technical terminology of our law is a haphazard confused affair, which ought to be replaced by a better one. The law is behind most of the other sciences in that respect. The lack of analysis and clear and exact definitions is one of the reasons why the courts so often seem to proceed on mere catchwords and phrases and misleading verbal analogies. It is an accepted axiom that definitions are dangerous. That is true of attempts to give short and simple definitions of complex legal conceptions, but does not apply to definitions of ultimate legal conceptions. A complex conception usually needs a series of definitions proceeding *per genus et differentiam.*

The materials being thus prepared by analysis and definition and embodied in a fitting terminology, we shall then, and not till then, be ready to proceed to synthesis and to build up our arrangement.

Of the main divisions of the law some are truly juridical, resting upon differences which belong to legal science and must be recognized in every arrangement; while others are non-juridical in their nature, the reasons for their existence being political or merely accidental. The distinction in this country between national and state law is non-juridical. The national government has been given jurisdiction over some matters and the states over others for political, not for legal reasons.

Another non-juridical division is into the law of the constitution and the ordinary law.

The distinction between law and equity is partly juridical and partly not. The existence of equity as a separate body of law administered by separate courts with a different procedure was due to historical accidents. In an arrangement of the law there would be no place for a separate subdivision labeled equity. But the differences between legal and equitable duties, rights and remedies

are juridical, and are real and important. The body of law which was worked out by Chancellors falls into two parts. *First,* there are certain primary or antecedent duties and rights which the common law did not recognize at all, which must find their place in an arrangement of the law alongside of the primary legal duties and rights with which they are analogous. What that place is I shall explain hereafter. *Secondly,* the Chancellor's court gave remedies of a different kind from those given by the courts of law, not only for the enforcement of equitable rights but also of legal rights which could be enforced by legal remedies, as in the case of the specific performance of a contract or of an injunction against a tort. These peculiar equitable remedies would in an arrangement fall into that division which treated of secondary or remedial rights, quite apart from the law of equities or primary equitable rights, and by the side of legal remedies.

Coming now to the juridical divisions of the law, the first to be noticed is that between Public and Private Law. Blackstone, so far as he notices the Public Law, puts it, excepting the criminal law, under the Law of Persons, and Austin, if I remember rightly, approves of that. It is of course possible to treat most of the Public Law in that way, as concerned with the duties and rights of the various classes of public officers, who may be regarded as types of abnormal persons. But such an arrangement seems to me to be somewhat forced and unnatural, and as to certain points of the Public Law hardly applicable at all. The better way, as it seems to me, is to make first a division of the law into Public and Private, although the Public Law would refer for many of its conceptions and definitions to the Private Law.

Of the Private Law the most important division is into Substantive and Adjective Law. The latter is that part of the law that deals with the method of enforcing the law, of obtaining remedies for wrongs. Practically it is the law of procedure and evidence. The rules that determine whether any remedy at all can be had, and if so, what kind of remedy, whether, for instance, a certain contract can be enforced specifically or only give ground for an action for damages, or whether an injunction can be had against the publication of a libel do not belong to the Adjective Law. The right to a remedy or to a particular kind of remedy is determined by the rules of the Substantive Law; but that having been determined, how to proceed to get the remedy is the question for the Adjective Law.

The Substantive Law falls into the two divisions of the Law of Primary or Antecedent Duties and Rights and the Law of Secondary or Remedial Duties and Rights, which may be called for short the Antecedent and Remedial Law. An antecedent or primary right or duty is one that does not arise out of the commission of a wrong, that exists antecedently to any wrong having been done, for instance the right of personal security or property, the duty not to do negligent acts, or a right or duty created by a contract. The Antecedent Law comprises very much the greater part of the law. When, however, a wrong has been committed, the injured party usually acquires a new kind of a right, which did not exist before, a remedial right, a right to some kind of a remedy. These rights form the subject matter of the Remedial Law. That part of the law contains the rules which decide whether any remedy or what kind of a remedy can be had for a wrong.

Another division of the Substantive Law is into the Law of Normal and the Law of Abnormal Persons. In the Roman law and by Blackstone most of the Law of Normal Persons is put under the head of the Law of Things. By the Roman jurists obligations, *i. e.*, rights arising *ex contractu* and *quasi ex contractu*, were treated as a kind of incorporeal things, and delicts or torts were regarded as giving rise to obligations *ex delicto* or *quasi ex delicto*. These latter were really remedial rights, but like obligations *ex contractu* were regarded as things. Thus it became possible to bring most of the Law of Normal Persons under the Law of Things, *i. e.* of Property. Other primary rights, *e. g.* personal security or reputation, were not expressly recognized at all, but were treated of only incidentally under the head of obligations *ex delicto, i. e.* of the remedial rights which arose from their violation.

The Law of Abnormal Persons is called by the civilians and by Blackstone simply the Law of Persons, as distinguished from the Law of Things, though both they and he include under the Law of Persons some matters that belong to the Law of Normal Persons.

The Law of Normal Persons comprises the main body of the law, all those rules and principles that do not depend upon some peculiarity in the person to whom they are to apply. But there are certain persons whom, because of physical or mental peculiarities, the law is forced to treat in some respects differently from

persons in general. These may be conveniently called abnormal persons, and the rules which apply peculiarly to them make up the Law of Abnormal Persons.

By what has been above said, the following arrangement of the whole body of the law is indicated.

First. Constitutional Law: the constitutions and the judicial decisions upon them.

Secondly. The Ordinary Law.

I. Public Law. This would include criminal law and criminal procedure.

II. Private Law.
- A. Substantive Law.
  - 1. Of Normal Persons.
    - (1) Antecedent Law
    - (2) Remedial Law
  - 2. Of Abnormal Persons.
- B. Adjective Law.

The remainder of this article will be confined to the arrangement of the Private Substantive Law, which comprises the great bulk of the law, and whose arrangement is of the greatest importance and presents the most difficulty.

It seems to me that a truly logical and satisfactory arrangement must be based on the conceptions of duty, right and wrong. Therefore I propose to begin with an analysis of those fundamental conceptions. As preliminary, however, to that, the meaning of an act must be explained.

I accept Austin's definition of an act, a volitional bodily movement. That is an act *stricto sensu.* The word is however conveniently used in the singular number to denote a group or series of bodily movements, *e. g.* the act of walking. The act itself comprises nothing more than the movement of the body or some part of it. The consequences of the act, the effects produced upon other persons or things by it, are no part of the act. Thus if *A* strikes *B* with a stick, the movement of *A's* arm is his act, but not the movement of the stick or its contact with *B's* body; still less the pain or bodily harm to *B*. Both in law and in common speech the word act is however often used to include some of the more proximate consequences of the bodily movement, *e. g.* the act of striking a person, where the contact with his body is included. That is an act *latiori sensu.* Consequences thus considered as in-

cluded in the act are called in our law direct consequences. Out of the same bodily movement and its consequences several different acts may often be carved by including more or fewer of the consequences. Thus the acts of aiming a gun and pulling the trigger, of firing the gun, of shooting at a man, of hitting him, and of killing him, all have the same bodily movements, but they include successively the following consequences, the motion of the gun and the lock, the explosion of the powder and the flight of the bullet, the contact of the bullet with the person shot, and his death. Sometimes even for legal purposes the same consequences may be taken either as included in the act, *i. e.* as direct, or as extraneous to it, *i. e.* as indirect. If for instance, *A* drives a motor car negligently and runs over *B*, *B* may have trespass "for the act" or case "for the negligence", the "act" being taken to include or not to include the contact of the car with *B's* body at the pleader's option. I have taken pains to explain the difference between acts *stricto* and *latiori sensu,* because the distinction between an act and its consequences seems to me to be of the utmost importance for legal purposes, and because I think that legally the word act should be strictly confined to bodily movements. Of mere "mental acts" the law takes no notice, except so far as they produce outward conduct.

A legal duty may be defined with sufficient accuracy for our present purpose as the legal condition of a person whom the law commands or forbids to do an act. The act will be called the content of the duty. But mere bodily movements, as such, are never commanded or forbidden by the law. If no consequences followed, a person might lawfully make or abstain from any sort of a bodily movement. The acts which are to form the contents of duties are defined for legal purposes by reference to their consequences. A duty to do an act is a duty to make whatever bodily movements may be necessary to produce a specified consequence. Thus the duty not to kill a man is not to make any bodily movement whatever the consequence of which will be his death. This does not mean that it is really acts *latiori sensu* which the law commands or forbids, that the word act in law means an act *latiori sensu;* because the consequences by reference to which the act commanded or forbidden is defined need not be direct consequences, that is, they need not be consequences which would be conceived of as included in the act itself, however wide a meaning might be given to the word act. A duty may be defined by reference to some indirect and even distant consequence of the act.

A duty is defined by defining the consequences which must or must not be produced by acts. Such consequences may be called the definitional consequences of the act or of the duty. An act which forms the content of a duty may also produce consequences which are not definitional of the duty but are yet of importance for legal purposes in connection with the performance or breach of the duty. Thus in the duty not to commit an assault and battery the only consequence that is definitional of the duty is the contact between the body of the person assaulted and the instrument with which the assault is committed, *e. g.*, a stick or a bullet. As soon as that contact takes place the breach of duty is complete. If such person suffers pain or, being disabled from attending to his business, incurs pecuniary loss, such pain and loss are not definitional consequences of the duty; yet in an action for the assault and battery they may have importance as a basis for an award of damages. The distinction between the definitional consequences of a duty and other non-definitional consequences that may flow from the act that forms its content is important. One of the chief defects in the form of our law at present is that it contains no definitions of the various legal duties, no enumeration and classification of duties. Duties have been treated of mostly indirectly under the head of wrongs or remedies. An arrangement of the law would have to contain in their appropriate places enumerations and definitions of all of the duties which the law imposes upon people, each duty being distinguished from other duties; and for that a clear understanding of the definitional consequences of the various duties is necessary.

The definitional consequences of a duty may be actual, probable or intended consequences of the act. This gives rise to a threefold classification of duties, which is very important. Duties may be divided into the following kinds.

1. Duties of actuality, defined by references to the actual consequences of the act. The duty is to do or abstain from such acts as will actually produce a certain consequence. If that consequence is not actually produced, the duty is not performed or is not broken, as the case may be, however good or bad the intention of the actor, or whether he was negligent or not. Most contract duties are of this sort. In the region of non-contractual duties, the duty of the keeper of a dangerous animal known to him to be such to prevent it from doing harm is a duty of actuality. If it does harm, he is liable even without negligence, though it is some-

times said that negligence on his part is implied or presumed, which is a useless and misleading fiction.

2. Duties of reasonableness, probability or due care, defined by reference to the probable consequences of the act. The duty is to act or not to act so as probably to produce certain consequences. Probability here means a reasonable probability or an unreasonably great probability, as the case may be. These are really duties to use due care, whose breach is due to negligence; because negligence, which in the legal sense does not mean a state of mind but a kind of conduct, is conduct which involves an unreasonably great probability or risk of causing harm. A duty of this kind, unlike a duty of actuality, may be broken though the definitional consequences never in fact happen. A person may do a negligent act, an act which is unreasonably likely to cause harm, and yet by good luck no injurious consequences may ensue. Of course in that case there is no tort or wrong, because, as will be presently explained, to make a wrong not only a breach of duty but also a resulting violation of right is necessary.

3. Duties of intention, defined by reference to the intended consequences of the act. The duty is not to do an act with the intention thereby to produce a certain consequence, *e. g.* not to make a false representation with an intent to defraud. There are two kinds of intention to produce a consequence; *viz:* simple intention, which is a bare intention to produce a certain consequence, without knowledge of the facts that make such a production wrongful, and culpable intention, where the actor knows such facts. For example, *A,* cutting timber on his own land, by mistake of the boundary line cuts over into *B's* land. Does he intend to cut *B's* trees? If simple intention is meant, yes. He intends to cut the very trees that he does cut, and they are *B's* trees. If culpable intention is meant, no. He does not know the fact that makes his act wrongful, namely, the position of the boundary line. Some duties of intention are duties of simple intention and some of culpable intention. Thus if *A* takes *B's* chattel supposing it to be his own, he is guilty of a tort. Taking possession includes an intention to take it, and a simple intention to take is enough to make the act a breach of duty. The duty not to take possession of a thing belonging to another is a duty of simple intention. But if *A* makes love to *B's* wife, supposing her to be a single woman, and thus alienates her affections from her husband, he is not

guilty of a tort, not knowing the fact of her marriage which makes the act wrongful. The duty not to alienate a wife's affections from her husband is a duty of culpable intention. Malice in the proper sense, actual as distinguished from what is called legal malice, is a state of mind which includes culpable intention; and so is fraud. It is convenient therefore to speak of duties of malice and of fraud, though those expressions sound queer.

Legal duties are subject to exceptions. Exceptions, like duties, have acts for their contents, and are defined by reference to definitional consequences. A duty belonging to one class may have exceptions belonging to another class. Thus a duty of actuality may have exceptions depending upon probability or intention. Duties and exceptions to duties must be carefully distinguished and kept separate. Some confusion has arisen from attempts to define a duty and allow for its exceptions in a single statement.

Duties are owed to various persons. To what persons a duty is owed will be explained hereafter. Any other person has no interest in or concern with its performance or breach. The person subject to a duty may be called the person of inherence, and the person to whom it is owed, the person of incidence.

The word right has four quite different meanings; there are four kinds of legal rights. As these different kinds of rights have no generally recognized names, I shall use certain names of my own for them.

(1) Correspondent rights. If *A* owes a duty to *B* to do or not to do a certain act, *B* has a right against *A* to have the act done or not done. The same act which forms the content of the duty forms also the content of the right. *B* is the person of inherence of the right, and *A* its person of incidence. In fact the duty and the right are the same legal relation between the parties. Looked at from *A's* side it is a duty to *B*; from *B's* side it is a right against *A*. This kind of rights seldom calls for notice in law, because the relation is usually most conveniently and fruitfully treated of under its aspect as a duty. When a duty has been declared to exist and defined, it is not necessary to say anything about the correspondent right separately. Those rights are mentioned here chiefly because some writers seem to have considered that this was the only legal meaning of the word right, that a right should always be thought of as a right to have some

act done or not done. The failure to take notice of other kinds of rights has also led to attempts to arrange the whole of the substantive law under the head of duties. A correspondent right can be violated, by failing to do or by doing the act which forms its content, as the case may be. A breach of the duty necessarily involves a violation of the right, the two being identical. But the right cannot be exercised. The exercise of a right means the doing by the holder of the right of the act which forms its content, and *ex definitione* there is no act to be done by him; the only act is to be done by the person subject to the duty. Of course the holder of the right may take steps to enforce it, *i. e.* to prevent the other party from violating it or compel him to make compensation for having violated it. But the enforcement of a right is different from its exercise. When the exercise of a right is spoken of, some other kind of a right is meant.

(2) Permissive rights. A person is said to have a right to do or omit an act, when the law does not forbid or command him to do it. The act is the content of the right. There are no duties corresponding to these rights, as there are to correspondent rights. In fact the conception of this kind of a right is essentially merely negative; it consists in the absence of a duty. It might seem therefore that what was said about correspondent rights applied to permissive rights also, that they would not call for notice separately from duties, that if all legal duties were fully described, permissive rights would be thereby sufficiently described, because a person may do anything that the law does not forbid and may refrain from any act which the law does not command him to do. Theoretically that is so. But practically, because otherwise the descriptions of legal duties would become cumbersome and complicated, it is sometimes more convenient to say what a person may do than to get at the same result by saying what he must or must not do. Especially in the case of property rights it is convenient to declare directly what a person who has a certain kind of right in a thing may do with the thing, and property rights are usually by legal writers handled partly in that manner, as consisting of permissive rights. For instance, we say that a tenant in fee simple may commit waste, but a tenant for years may not. The whole conception of permissive rights is only for the sake of convenience, especially for convenience in reference. It may take less time to mention a permissive right than to mention all the other acts which the person must or must not do.

Some most important rights, many of which are protected by constitutional provisions, belong to the class of permissive rights, *e. g.* the rights of religious liberty or of free speech. But not all rights which are protected by the constitution are permissive rights. A permissive right cannot be violated. The violation of a right must be by the conduct of some person other than the holder of it, and there is no such conduct that is referred to in the definition of the right, only the conduct of the holder of the right himself. It is true that the holder of the right may be prevented from exercising his right. But such a prevention, if wrongful, must be by some interference with his person or belongings that amounts to a violation of some other kind of a right, *e. g.* his right of personal security, liberty or property. If a person is imprisoned to prevent him from exercising his right of religious liberty by going to the church of his choice, the imprisonment is a violation of his right of personal liberty, a right of a different kind, which would be equally a violation of it if he did not care to go to church at all. Permissive rights can be exercised. Indeed when we speak of exercising a right, it is almost always a permissive right that is meant. To exercise the right, as I have said, means to do the act that forms its content. The acts that form the contents of permissive rights, as in the case of duties, are defined by reference to certain of their consequences, in the case of rights always actual consequences, which are the definitional consequences of the rights. A right to do a certain act means a right to make any sort of bodily movements so as to produce certain consequences. If the right, as in the case with property rights, is a right in a thing, which may be called its object, the only consequences which can be definitional of the right are consequences produced upon that thing. But an act done in the exercise of a right, which produces consequences definitional of the right, and in connection with those consequences is truly an exercise of the right, may also produce other consequences which are not definitional, in connection with which it is not an exercise of the right at all, and indeed may be tortious. Of course the act so far as it produces definitional consequences cannot be wrongful, but it may be so far as it produces non-definitional consequences. This is the explanation of the maxim *sic utere tuo ut alienum non lædas,* which may be roughly translated: in doing acts in the exercise of your own permissive rights, do not produce non-definitional consequences which are violative of the rights of others. It is necessary to distinguish between an act which is an

exercise of a right and an act done in the exercise of a right; but the same act may have both characters.

To illustrate: *A* is the owner of a gun and its loading. Ownership includes a permissive right to do whatever the owner pleases with the thing owned, to produce any sort of consequences upon it. *A* shoots *B's* cow with the gun. His act is an exercise of his right so far as it produces consequences upon the gun, the powder and the bullet, *e. g.* the flight of the bullet; those consequences are definitional of his right. But the consequences produced upon the cow are not definitional of his right; and in connection with them his act is not an exercise of his right, but is tortious.

(3) Protected rights. Although the law is a system of rules whose direct and immediate object is to command and forbid acts, its ultimate object is always to protect states of fact. Some state of fact is always the *summum bonum* for the law. Acts are important only relatively to states of fact. A state of fact which the law seeks to protect may be one that already exists, such as the life of a person or his good reputation or his possession of a thing of which he has possession, or it may be one that the law seeks to bring into existence, such as the possession by a creditor of money which is owed to him or the future education of a child. The protection is given by creating and enforcing duties whose performance will, or will tend to, protect, *i. e.* conserve or bring into existence, the state of fact. The definitional consequences of duties are often either identical with the states of fact which the law seeks to protect by imposing the duties or are contradictory states of fact, in which latter case either state of fact may be spoken of as definitional of the duty, or one may be said to be positively and the other negatively definitional. Thus in the duty of a bailee to protect the chattel from injury, the good physical condition of the chattel is the state of fact to be protected and is also the definitional consequence of the duty. But in a duty not to kill a man, his life is the state of fact to be protected, while his death, which is its contradictory, is the definitional consequence of the duty. But sometimes the definitional consequence of a duty is not the fact to be protected, but some intermediate state of fact, which, if it exists, will in turn produce or conserve the protected fact. Thus in a duty of the seller of poison to label it "Poison," the definitional consequence of the duty is the presence

of a proper label on the bottle, but the fact to be protected is the lives of persons who may deal with the article.

Because the definitional consequences of duties do not always coincide with the states of fact that are ultimately to be protected, and also, and especially, because, as will be hereafter explained, the same state of facts may be protected by various different duties and the same duty may be imposed for the protection of various states of fact, it is impossible, or at least would be difficult and inconvenient, to describe the states of fact that the law protects in connection with duties. Yet somewhere they must be described fully and in detail. It is therefore a matter of obvious convenience to describe the protected states of fact once for all in their appropriate place, and then they can be briefly referred to as *praecognita* in defining the various duties. This however, as will be explained, does not fully apply to obligations.

Those protected states of fact, which are the ultimate objects of the law's solicitude, whose description is for convenience to be separated from the description of the acts which the law commands or forbids for their protection, form the contents of a class of rights very different in their nature from and of more importance for legal purposes than the other classes of rights whose contents are acts. They are rights in states of fact, not in acts. A protected right may be defined as the legal condition of a person for whom the law protects a state of fact by imposing duties on other persons, whose performance will or will tend to conserve or bring into existence that state of fact. The state of fact, not any act, is the content of the right. To define such a right is to describe the protected state of fact, which may be done without any reference to the acts commanded or forbidden for its sake. The mere state of fact is a thing which can be described independently and by itself.

Such a right may have a thing for its object, in which case the protected state of fact is some condition of the thing, and nothing else. A person may also stand as the object of such a right; *e. g.* a husband has rights in his wife as to her chastity, which is a condition of her body. But the right need not have any person or thing for its object. This is true of the right of reputation. A man's reputation is a state of fact which the law protects, but is not a thing.

When a duty is imposed to protect a certain right, the duty corresponds to that right. There is no general rule to decide what

duties correspond to a particular right or to what rights a particular duty corresponds. Some duties correspond to many rights, and some to few; some rights have many corresponding duties, and other rights few. Thus the right of property is protected by many corresponding duties, one of which is the duty not to do negligent, *i. e.* unreasonably dangerous, acts, which duty also corresponds to many other rights, *e. g.* to various rights of personal security and rights in the persons of others, such as some of a husband's rights in his wife's bodily condition. On the other hand duties not to publish slanders and libels correspond only to the right of reputation, and are the only duties that correspond to that right.

Regularly a duty is owed to all persons who have rights of the kind to which it corresponds, and to no one else. Duties so far as they correspond to property rights are owed only to the holders of property; but since all persons have rights of personal security, duties which correspond to those rights are owed to everybody. But sometimes certain classes of holders of such rights are excluded from the scope of the duty. Thus certain duties to use care, which correspond generally to rights of personal security and property, are not owed to trespassers, although trespassers have such rights.

Protected rights can not be exercised, there being no act to be done or omitted by the holder of the right. But they can be violated. When we speak of the violation of a right, it is usually this kind of a right that we mean. The violation of a right means any impairment of the protected state of fact, at least if such impairment is caused by someone's conduct. Impairment here includes the failure of the protected state of fact to come into existence at all, when its coming into existence is the object of the law, *e. g.* the non-payment of a debt. The above described meaning of the word violation is wider than the ordinary meaning. Generally the word is used with the implication that the conduct by which the protected state of fact is impaired is wrongful, so that the violation of a right imports a wrong or injury. But as I here use the word, that is not necessary. Any impairment of the protected state of fact I shall call a violation of the right, which may be quite innocent. It is only where the conduct is a breach of some duty that corresponds to the right that it is wrongful.

(4) Facultative rights. Such a right is a legal power or ability to do something which would otherwise be legally impossible.

It is legal, not natural or physical, possibility that is here referred to. A permission to do some act which the actor could do without the permission creates a permissive, not a facultative, right, *e. g.* a permission to a railroad company to lay its tracks in a street. But a franchise to become a corporation is a facultative right, because without the franchise it would be legally impossible to form the corporation.

Facultative rights can be exercised. With some of them the exercise is by the mere act of the holder of the right, like a power of appointment, which is a facultative right to dispose of property in which the holder of the power may have no other right or interest. Other facultative rights can be exercised only through the agency of a court, such as an equitable lien, which is also a right to dispose of property in which the power holder has no other interest.

Facultative rights can not be violated, and have no duties corresponding to them. It is true that they are often created to enforce the performance of duties, as in the case of certain liens. But the duty does not correspond to the right of lien, and would equally exist if it were not secured by the lien. Thus the duty to pay a debt corresponds to a protected right of the creditor, and is enforcible independently of any lien. It is not intended to be asserted that all liens are mere facultative rights. A mortgage or pledge, for instance, comprises also protected and sometimes permissive rights.

Rights are *in rem* and *in personam*. Those names are inappropriate, because a right *in rem* need not concern a thing, and all rights are against persons.

A right *in rem* is one that avails against persons generally. If it is a permissive or facultative right, it can be exercised as against any one; if a protected right, duties corresponding to it rest upon all other persons. On the other hand a right *in personam* avails only against some specific person or persons, and duties corresponding to it rest only on such persons. However in the case of a right *in rem*, although some duties corresponding to it rest upon all persons, it does not follow that that is so of all its corresponding duties, or that all other persons must have the same duties to the holder of the right. There are certain negative duties, duties to forbear from acts, which correspond to rights *in rem, e. g.* the duty not to do negligent acts, to which all persons are subject. But there are no affirmative duties, duties to do acts,

of that generality. Duties to do acts always arise out of some special situation in which the person subject to the duty stands, and rest only upon persons in such situations. Nevertheless they may correspond to rights *in rem*. Thus the possessor of a dangerous thing comes under a duty to use care, *i. e.* to do such acts as are reasonably necessary, to prevent it from doing harm. This duty rests only on possessors of such things. But it corresponds to rights of personal security and property of other persons, which are rights *in rem*.

The importance of the distinction between rights *in rem* and *in personam*, in relation to the arrangement of the law, is this: protected rights *in rem* are few in number, are defined wholly by general rules of law and not by agreement, and, as has been said, can and must be enumerated and defined separately from the duties which correspond to them. The rights and the corresponding duties depend upon different facts, and can arise, be varied or cease to exist independently of each other. They must be classified according to their respective contents. But with rights *in personam* the case is very different. With them the right and the duty arise from the same facts or transaction, usually an agreement; their contents vary without limit, being, when the right and duty are created by agreement, just what the parties choose to make them; one can not be varied or extinguished without a corresponding effect upon the other; and any classification of them by their contents is impracticable, the only practicable classification being according to their mode of origin. Therefore, in an arrangement of the law, rights *in personam* would have to be treated in connection with their corresponding duties, and in a separate place and on a different plan from rights *in rem*.

The elements of a wrong—speaking only of civil injuries, not of crimes, to which latter the following statements do not wholly apply—are as follows:

(1) There must be a breach of duty. Damage not due to a breach of duty, though, as above explained, it may amount to a violation of a protected right, is *damnum absque injuria*.

(2) There must be a violation of a protected right. A mere breach of duty, *e. g.* a negligent act which by good luck does no harm, but is nevertheless a breach of duty, or a fraudulent misrepresentation which is not believed and therefore produces no consequences, though a breach of a duty of intention, is not a wrong.

(3) The duty broken must correspond to the right violated and be owed to the holder of that right. This subject of the correspondence of duties to rights is not generally understood and has not been well developed by judges and text writers. It is usually confounded with the subject of the proximateness of consequences, and defendants have often been held not liable for damage from their conduct for the reason given that the damage was only a remote consequence of the conduct, when the true reason should have been that the duty broken did not correspond to the right violated or was not owed to the particular person injured, in which latter case it is often said that the injured person assumed the risk of the injury. A proper understanding of the correspondence between the various kinds of rights and duties is necessary to a sound theory of wrongs. But the subject is too large and complicated to be gone into here. I have discussed it at some length in an article in the Yale Law Journal of January, 1916.

For example: the duty of a railroad company to use care to keep its cars in a safe condition corresponds to rights of personal security, and is owed to passengers. But if a tramp steals a ride upon a car, it is not owed to him, though he has as good a right of personal security as a passenger has. Therefore he has no action if he is hurt by a defect in a car.

(4) The violation of right must be the actual, and also the proximate, consequence of the conduct that constitutes the breach of duty. It may be the actual consequence without being the proximate consequence. The actuality and the proximateness of a given consequence in relation to a given cause are two quite different questions, the former being always a question of fact, while the latter may be one of law. The question of the proximateness of consequences is the most difficult one that I have found in the law. I have discussed it in an article in the Harvard Law Review of November, 1914.

It will be enough to say here that proximateness most often depends upon probability; but not always, as is sometimes asserted.

As soon as the above-mentioned conditions have been complied with, there is a complete wrong, for which an action will lie. But after a complete wrong has arisen, further injurious consequences may ensue, which, though not a part of the wrong but extraneous to it, may still be the subject of a recovery in an action for the wrong, and may aggravate the damages. Such consequences will

be called in this article consequential damage. The violation of right that is an essential element in the wrong, without which there would be no wrong and whose presence is sufficient, without more, to complete the wrong, must therefore be carefully distinguished from consequential damage, though the latter may consist in a violation of right and even in a further violation of the same right that has been violated in the wrong. However in ordinary use the term consequential damage often includes the very violation of right that is an element of the wrong, where that is only an indirect consequence of the wrongful act.

TO BE CONCLUDED.

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